

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



# 75-7006

To be argued by  
SIDNEY FELDSHUH

In The  
**United States Court of Appeals**

For The Second Circuit

DAVID STIRLING, JR. and WILLIAM G. STIRLING,

*Plaintiffs-Appellants,*

vs.

CHEMICAL BANK, individually, and as Agent; THE CHASE MANHATTAN BANK, N.A.; MARINE MIDLAND BANK-WESTERN; MARINE MIDLAND BANK-ROCHESTER; LINCOLN FIRST BANK OF ROCHESTER (formerly LINCOLN ROCHESTER TRUST COMPANY); UNION COMMERCE BANK, FRANK BEATTY; JOHN J. IRISH; PAAVO PRIMA; "RICHARD ROE"; "MICHAEL ROE"; "MARTIN ROE"; "ALPHONSE ROE"; and "BILL ROE"; (quoted names fictitious, true names being unknown, the parties intended being officers and/or employees of the respectively named defendant banks, as co-conspirators, along with other co-conspirators, not herein named),

*Defendants-Appellees.*

## REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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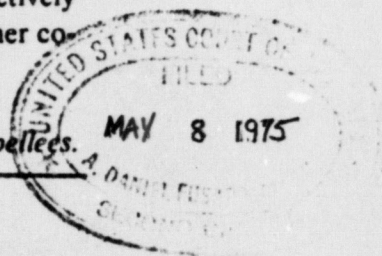
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SECOND CIRCUIT  
NEW YORK, N.Y.

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UNITED STATES COURT OF APPEALS  
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No. 75-7006

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DAVID STIRLING, JR. and WILLIAM G. STIRLING,  
Plaintiffs-Appellants,  
-against-

CHEMICAL BANK, individually, and as Agent:  
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BANK-WESTERN; MARINE MIDLAND BANK-ROCHESTER;  
LINCOLN FIRST BANK OF ROCHESTER (formerly  
LINCOLN ROCHESTER TRUST COMPANY); UNION  
COMMERCE BANK; FRANK BEATTY; JOHN J. IRISH;  
PAAVO PRIMA; "RICHARD ROE"; "MICHAEL ROE";  
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and/or employees of the respectively named  
defendant banks, as co-conspirators, along  
with other co-conspirators, not herein named),

Defendants-Appellees.

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PLAINTIFFS - APPELLANTS' REPLY BRIEF

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This brief is submitted in reply to the consolidated  
brief of the several defendant - appellees filed on April  
21, 1975.



### ARGUMENT

PLAINTIFFS AS SECURITY HOLDERS ARE ENTITLED  
TO THE PROTECTION OF THE ANTI-FRAUD PROVISIONS  
OF THE FEDERAL SECURITIES LAWS.

Defendants argue that plaintiffs have no standing to maintain the instant action pursuant to the anti-fraud provisions of the Federal Securities Laws because they were neither purchasers nor sellers of securities. This overly restrictive interpretation of the said anti-fraud provisions is outdated,<sup>1</sup> inconsistent with the intent of Congress<sup>2</sup> and with the interpretation of the Securities and Exchange Commission.<sup>3</sup>

The facts alleged in the amended complaint clearly establish that plaintiffs, induced by defendants' fraudulent acts, took certain detrimental action other than a traditional purchase or sale of securities. Plaintiffs, as officers, directors and 40% shareholders of the Stirling Homex Corporation ("Homex") entered into negotiations initiated by defendants at a time when unsecured loans to Homex by the defendants of approximately \$38,000,000 were overdue. The purported purpose of the negotiations was to raise additional capital for Homex.

1. Eason v. General Motors Acceptance Corp., 490 F.2d 654 (7th Cir. 1973), cert.denied 416 U.S.960, (1974); Manor Drug Stores v. Blue Chip Stamps, 492 F.2d 136 (9th Cir.1973), cert.granted 42 L.ed. 2d 264 (1975).
2. Supt. of Insurance v. Bankers L.&C. Co., 404 U.S. 6,12,fn.8 (1971).
3. Vine v. Beneficial Finance Company, 374 F.2d 627,636 (2nd Cir. 1967).

Predicated upon defendants' misrepresentations plaintiffs took the following action which were detrimental to Homex, Homex shareholders and plaintiffs as officers, directors and shareholders:

1. Discontinued negotiations for additional capital with another financial institution.
2. Declined to take other necessary steps to forestall the insolvency of Homex, which steps would reasonably have been taken had defendants' true intentions been made known.
3. Entered into the revolving credit agreement with the defendants by reason of which substantial assets of Homex were pledged as security.
4. Executed additional notes as further security under the revolving credit agreement.
5. Agreed to pledge their Homex shares as further security under the revolving credit agreement.
6. Failed to disseminate adverse financial information pertaining to Homex regarding the true intention of the defendants, which adverse information was withheld from plaintiffs by defendants.
7. Resigned their positions as officers and directors of Homex.



8. Acquiesced in defendants' demand to place their deputy as chief executive officer of Homex.

The foregoing fraudulently induced detrimental actions, among others, cleared the way for defendants to place Homex in involuntary bankruptcy proceedings pursuant to Chapter X of the Bankruptcy Act while fraudulently holding themselves out as secured creditors. As a direct result of the entire fraudulent plan and scheme of defendants the plaintiffs, the other Homex shareholders and Homex sustained substantial damages in the form of a precipitate drop in the market value of Homex securities.

Although several of the above enumerated detrimental acts may be construed as securities transactions, such construction is unnecessary. The gravamen of plaintiffs' complaint is that by perpetrating an elaborate fraudulent plan and scheme defendants wrongfully induced plaintiffs to do certain acts and to abandon other reasonably anticipated courses of action, all of which directly related to Homex securities. The ultimate effect of the entire sordid episode was the substantial loss sustained by Homex and its shareholders by reason of defendants desperate attempts to create the illusion of secured creditor status. The flexible reading of Section 10b of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated

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thereunder mandated by the Supreme Court in Supt. of Insurance v. Bankers L.&C.Co., supra, requires that the damages sustained by defendants' deceptive devices and contrivances be redressed through the vehicle of the anti-fraud provisions of the Federal Securities Laws. See also Affiliated Ute Citizens v. United States, 406 U.S.123,151 (1972); Eason v. General Motors Acceptance Corp., supra; Vine v. Beneficial Finance Company, supra; Manor Drug Stores v. Blue Chip Stamps, supra; and A.T. Brod v. Perlow, 375 F.2d 393 (2nd Cir. 1967).

However, the Court may feel constrained to identify a traditional purchase or sale of securities as a predicate to the instant action. In that event plaintiffs urge that the transactions involving the execution of the revolving credit agreement, the financing statements and the promissory notes, as well as plaintiffs' pledge of their Homex stock, constitute such traditional securities transactions.

When viewed in their proper perspective these transactions were not strictly commercial transactions but were essentially investment transactions. Considering that at the time the revolving credit agreement and the related documents were executed the defendants had already advanced to Homex approximately \$38,000,000 on an unsecured basis and also considering that the defendants were receiving rights to sub-



stantial assets of Homex and plaintiffs, it is manifest that these transactions were truly investments by the defendants and not commercial in nature and hence are subject to the anti-fraud provisions of the Federal Securities Laws. See Welch Foods, Inc. v. Goldman Sachs & Co., CCH Fed.Sec.L.Rep. ¶94,806 (S.D.N.Y. 1974); Davis v. Avco Corp., 371 F.Supp.782 (N.D. Ohio 1974).

#### CONCLUSION

For all of the foregoing reasons and for the reasons set forth in plaintiffs - appellants' brief, the judgment below must be reversed and this action must be remanded to the District Court for pre-trial proceedings and trial.

Dated: New York, N.Y.  
May 7, 1975.

Respectfully submitted,  
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UNITED STATES COURT OF APPEALS  
for the Second Circuit

DAVID STIRLING, JR., etal.,

Plaintiffs-Appellants,

- against -

CHEMICAL BANK, etal.,

Defendants-Appellees.

Index No.

Affidavit of Service by Mail

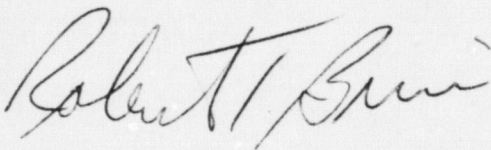
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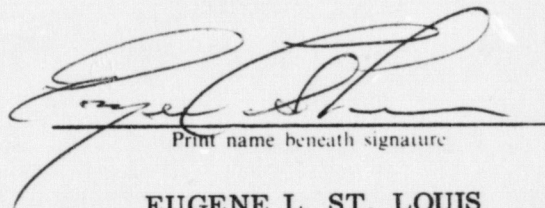
I, Eugene L. St. Louis being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
1235 Plane St, Union, N.J. 07083  
That on the 8th day of May 19 75, deponent served the annexed  
Reply Brief  
upon see below attorney(s) for  
in this action, at see below

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Sworn to before me, this 8th  
day of May 19 75.



ROBERT T. BRIN  
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No. 31-0418950  
Qualified in New York County  
Commission Expires March 30, 1977

  
Print name beneath signature  
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NIXON HARGRAVE DEVANS & DOYLE  
LINCOLN FIRST TOWER  
Rochester, N. Y.

PHILLIPS LYTTLE HITCHCOCK BLAINE  
& HUBER  
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Buffalo, N. Y.



the plan and scheme of conspiracy alleged herein and the

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Appellants,

-against-

CHEMICAL BANK, et al.,

Appellees.  
-----

Docket No.  
75-7006

AFFIDAVIT OF  
SERVICE BY MAIL

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

The undersigned, being duly sworn, deposes and says:  
Deponent is over the age of 18 years, is not a party to this action  
and resides at 710 Rhineclander Ave., Bronx, N.Y. 10462

On the 21st day of April 19 75 deponent served the  
annexed Brief

upon ~~each of~~ <sup>two</sup> the below listed attorney(s) by depositing a ~~true copy~~  
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and custody of the United States Postal Service within the State of  
New York.

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Sworn to before me this 21st)  
day of April 19 75 )

Ralph M. Dionne

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Notary Public, State of New York  
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Cert. Filed in New York County  
Commission Expires March 30, 1976

John Murphy  
John Murphy

UNITED STATES COURT OF APPEALS  
for the Second Circuit

DAVID STIRLING, JR., et al.,

Plaintiffs-Appellants,

- against -

CHEMICAL BANK, et al.,

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Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

ss.:

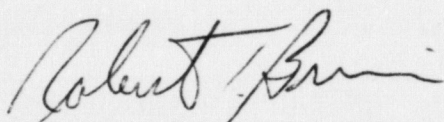
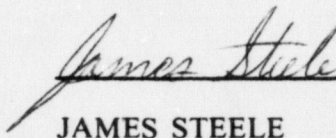
I, James Steele, being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
250 West 146th, Street, New York, New York  
That on the 8th day of May 19 75 at see ~~be~~ attached

deponent served the annexed Reply Brief upon

see attached

the attorneys in this action by delivering <sup>2</sup> a true copy <sup>ES</sup> thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the Attorney(s) herein,

Sworn to before me, this 8th  
day of May 19 75

JAMES STEELE

ROBERT T. BRIN  
NOTARY PUBLIC, State of New York  
No. 31-0418950  
Qualified in New York County  
Commission Expires March 30, 1977



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